

MARINE CONSERVATION ALLIANCE

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May 28, 2004

ALYESKA SEAFOODS
ALASKA DRAGGERS
ASSOCIATION
ALASKA GROUNDFISH DATA
BANK
ALASKAN LEADER
FISHERIES
ALASKA PACIFIC SEAFOODS
ALEUTIAN ISLANDS BROWN
CRAB COALITION
ALEUTIAN PRIBILOF ISLAND
COMMUNITY DEVELOPMENT
ASSOCIATION
ANUTAN, ATKA, FALSE PASS, NELSON LAGOON,
NINDOLSKI, ST. GEORGE
AT-SEA PROCESSORS
ASSOCIATION
BRISTOL BAY ECONOMIC
DEVELOPMENT CORP.
ALDENMARK, CLARK'S POINT, DILLINGHAM,
EISENBERG, ERIK, ERYK, KING SALMON,
LEVELOCK, MANOKOTAK, NARNEK, PILOT POINT,
PORT HEDDEN, PORTAGE CREEK, SOUTH
NARNEK, TOGAK, TWIN HILLS, USASINK
CENTRAL BERING SEA
FISHERMEN'S ASSOCIATION
ST. PAUL
CITY OF UNALASKA
COASTAL VILLAGES REGION
FUND
CHIEFOFNAK, CHEYAK, EDK, GOODNEWS BAY,
HOOPER BAY, KIPNUK, KONGIGANAK,
KIRSELINOOK, MEROWYUK, NAKAGAK,
NAPASNAK, NEWYOK, NORTONVILLE, OCEANVILLE,
PLATINUM, QUINAGAK, SCAMMON BAY,
TOSOOK BAY, TUNTULUAK, TUNUNAK
GROUNDFISH FORUM
HIGH SEAS CATCHERS
COOPERATIVE
ICICLE SEAFOODS
MCCARTY AND ASSOCIATES
MID-WATER TRAWLERS
COOPERATIVE
MOTHERSHIP GROUP
PV EXCELLENCE
PV OCEAN PHOENIX
PV GOLDEN ALASKA
NORTH PACIFIC FISHERIES
RESEARCH FOUNDATION
NORTH PACIFIC LONGLINE
ASSOCIATION
NORTH PACIFIC SCALLOP
COOPERATIVE
NORTON SOUND
ECONOMIC DEVELOPMENT
CORPORATION
BREVIG MISSION, DIOMEDE, ELM, GAMBELL,
GOLOVIN, KOTUK, NOME, SAINT MICHAEL,
SAVOOKA, SHANTOOK, STEBBINS, TELLER,
UNALASKA FLEET, WALES, WHITE MOUNTAIN
PACIFIC SEAFOOD
PROCESSORS ASSOCIATION
PROWLER FISHERIES
SEAFOOD COLD STORAGE
ASSOCIATION
SOUTHWEST ALASKA
MUNICIPAL CONFERENCE
TRIDENT SEAFOODS CORP.
UNITED CATCHER BOATS
ANUTAN CATCHER VESSEL ASSOC.
ARCTIC ENTERPRISE ASSOC.
NORTHERN VICTOR FLEET
PETER PAN FLEET COOPERATIVE
UNALASKA CO-OP
UNSEA FLEET COOPERATIVE
WESTWARD FLEET COOPERATIVE
WESTERN ALASKA
FISHERIES, INC.
YUKON DELTA FISHERIES
DEVELOPMENT
ASSOCIATION
ALAKANUK, EMMONAK, GRAYLING, KOTLIK,
MOUNTAIN VILLAGE, NUNAM IOLA

Ms. Kaja Brix
Chief, Marine Mammal Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Ms. Brix:

The Marine Conservation Alliance (MCA) offers the following comments in response to the Proposed Rule published by the National Marine Fisheries Service (NMFS) proposing a definition of the zero mortality rate goal (ZMRG) under the Marine Mammal Protection Act (MMPA). 69 Fed. Reg. 23477 (April 29, 2004).

The MCA was established in 2001 by fishing associations, communities, community development quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations based upon sound science, prudent management, and open public process. The MCA supports research and public education about the fishery resources of the North Pacific Ocean and seeks practical solutions to resource use questions to protect the marine environment and to minimize adverse impacts of the North Pacific fishing community.

We are attaching, and incorporating by reference, the comments we filed on September 4, 2003 in response to the Advance Notice of Proposed Rulemaking (ANPR) regarding the ZMRG definition published by NMFS. Those comments apply with equal force to the Proposed Rule. That said, there are six points we wish to emphasize.

1. The proposed definition of ZMRG as a fixed numerical point is inconsistent with the legislative history of this provision of law. We recounted that legislative history in our September 4, 2003 comments. Significantly, our comments and conclusions echoed yours as expressed in the ANPR. Congress intended ZMRG to be a goal to eliminate unnecessary marine mammal mortalities and serious injuries. The seafood industry supports that goal and has worked hard to develop fishing gear and techniques to achieve that goal. As the legislative history of the ZMRG provisions makes clear, Congress intended that this was precisely the manner in which ZMRG was to be achieved. Congress intended that ZMRG be achieved when industry employs the best available technology to minimize marine mammal injuries and mortalities that is economically and technologically feasible.

Instead of abiding by Congressional intent, NMFS is proposing to establish ZMRG as a fixed numerical standard. Indeed, NMFS now states economic and technological considerations are irrelevant and any fishery exceeding NMFS' arbitrarily established numerical standard will not have achieved ZMRG, even if technical solutions are not available. 69 Fed. Reg. at 23488. The Proposed Rule goes on to state that economic and technological considerations will, however, be a factor in formulating a take reduction plan. *Id.* Taking economic and technological considerations into account after the fact is very much like closing the barn door after the horse has escaped.

2. The proposal to allow NMFS to modify the ZMRG formula is legally unsupportable and further violates Congressional intent. The Proposed Rule provides that NMFS may adjust the ZMRG standard and adopt a different, and presumably more restrictive standard, "when information is insufficient to estimate the level of mortality and serious injury that would have an insignificant effect" on the species. 69 Fed. Reg. at 23491. Thus, the Proposed Rule first establishes ZMRG as a fixed number in violation of Congressional intent and then provides that NMFS can arbitrarily change that number to whatever NMFS wishes if NMFS decides, using some unknown and unspecified process and standard, that the data are uncertain. Such an arbitrary and standardless rule is legally suspect because it lacks the specificity required pursuant to the Administrative Procedure Act and is void for vagueness. Moreover, this aspect of the Proposed Rule is an even more egregious violation of Congressional intent. Congress did not intend for ZMRG to be a fixed numerical point, let alone an unknown number arbitrarily selected by NMFS whenever NMFS decides that NMFS does not have 100% of the information NMFS might wish to have.

3. The MMPA's goal is to maintain marine mammal populations at their optimum sustainable population (OSP). The Proposed Rule admits that when a species' population level is at 60% of the habitat's carrying capacity, then that species is at OSP. *Id.* at 23483. Nevertheless, the Proposed Rule states the effect of the proposed ZMRG definition will be to maintain marine mammal populations at 90-98% of the habitat's carrying capacity. *Id.* NMFS is using ZMRG to impose on commercial fishermen a new and arbitrarily selected standard that exceeds what is required by the law and by NMFS' own OSP regulations.

4. The Proposed Rule admits that as long as human induced mortality does not exceed Potential Biological Removal (PBR), then a marine mammal species will achieve OSP --- which is the goal of the MMPA. *Id.* at 23482. Nevertheless, the Proposed Rule defines ZMRG as 10% of PBR --- a fixed numerical standard without scientific basis and not needed for a species to achieve the statutory goal of OSP.

5. The MCA's September 4 comments noted that PBR is itself a conservative methodology for computing acceptable levels of removal. NMFS' response in the Proposed Rule seems to take issue with this. NMFS' response overlooks the facts. For example, in every management context with which we are familiar, population estimates are prepared within

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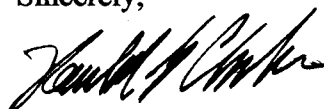
certain confidence intervals. It is not customary to always take the lowest possible population number and assume that to be the actual population. However, that is precisely the methodology used in the PBR calculation. Although the purpose of this comment is not to challenge the PBR calculation, it is inappropriate for NMFS to refuse to recognize that the PBR calculation is already a very conservative and protective formula.

6. The Proposed Rule never explains why NMFS abandons any pretext of ecosystem-based management when it comes to marine mammals. It is significant that NMFS has testified to Congress that marine mammal populations presently existing at or near their habitat's carrying capacity, i.e., at their ZMRG level, are likely to be impeding the recovery of endangered and threatened salmon. In testimony presented to the House Resources Committee in October, 2001, NMFS asserted there are "serious concerns about . . . the impacts of pinnipeds on salmon listed under the Endangered Species Act." So, on the one hand, NMFS states marine mammals may be impairing the recovery of certain endangered and threatened salmon, and on the other -- in the Proposed Rule -- says marine mammals are more important than, and are to be given priority over, all species, including endangered species.

We believe NMFS' Proposed Rule defining ZMRG is inconsistent with the purposes of the MMPA and with Congressional intent. The Proposed Rule should be withdrawn and reissued in a manner that is consistent with the MMPA and the legislative intent of the ZMRG provisions.

We appreciate the opportunity to submit these comments and would be pleased to meet with you or other agency officials to discuss them further.

Sincerely,



Ronald G. Clarke
Executive Director

Enclosure